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THE ROLE OF THE MEDIA IN ACHIEVING A FAIR TRIAL IN THE REPUBLIC OF KOSOVO

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Abstract. Transparency of the courts and access to public documents are considered as basic principles that directly affect citizens' trust in judicial institutions, and are the primary vehicles for increasing the levels of accountability and responsibility in the judiciary system. A link and line of communication between institutions and the public is mainly done through the media, a global trend that also applies in the Republic of Kosovo. Media as judiciary monitors the work of the judiciary, continuously reporting to the public and informing them of the work these institutions do, their challenges and successes, their adherence to human rights, and even their violations. In short, as the courts divide justice, the media sees how it is shared. This article aims to reflect the real state of the media's role in Kosovo as a factor of attaining fair trial, based on Kosovo's criminal legislation and provisions of the European Convention on Human Rights and Freedoms. For a comparison between them and the case of law, some of the rulings of the European Court of Human Rights in Strasbourg have been taken into account. The Constitution of Kosovo guarantees the human rights and freedoms enshrined in this Convention.

Keywords: media, journalist, freedom of speech, fair trial

Introduction

Human rights and fundamental freedoms are guaranteed by the international agreements and instruments discussed below, and are guaranteed by the Constitution of, and are directly applicable in, the Republic of Kosovo.

One of these basic human rights is the right to fair trial guaranteed by Article 6 of the European Convention on Human Rights and Freedoms (ECHR), which states that a key aspect of this principle is publicity. Based on this Convention the Constitution of the Republic of Kosovo guarantees in Article 31 that: everyone shall be guaranteed equal protection of rights in proceedings before courts, other state authorities, and holders of public powers.

But the publicity of the trial is not just about the presence of the parties in the proceedings. It is also closely linked to the media presence at the hearing and the media's access to official documents.

In contemporary society the media have the role of public informer because they collect and disseminate information that is in the public interest. The media address state institutions, reflecting the concerns, worries, and problems of citizens. They also monitor institutions and inform the public of their work, therefore serving as a bridge between institutions and the wider public. By utilizing the freedom of expression guaranteed by domestic and international law, journalists have (or at least should have) access to official documents and the

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direct activity of institutions. The media have a special role in monitoring courts and the entire justice system, and the monitoring and publication of court proceedings by the media to the public is a right that falls within the framework of law, freedom of thought, and expression. Court reporting (including publication and transmission of images) must be accurate, fair, and non-prejudicial, as well as fully respecting of the right to a fair trial. The media are responsible for keeping the public informed of the judiciary's activities, and their quality reporting has the potential to build public confidence in an effective judicial system. As a result, they are the main partners of judicial institutions in improving their communication with public (Balkans Policy Research Group, 2019. p. 8).

1. The media and the presumption of innocence

The media in Kosovo, when reporting on the work of the judiciary and in different types of publications of judiciary cases, differ from one place to the other, and do not always exercise caution in withholding judgement on the outcome of a case whilst the judiciary does its job. There are cases in which journalists disregard the court by publishing prejudicial information whilst the case is still on trial. Journalists must always respect the presumption of innocence, and must therefore be reluctant to describe someone as a criminal before the court reaches its final verdict. This principle is an integral part of the right to a fair trial and therefore information about the conduct of criminal proceedings in open hearings should be communicated through media only where this does not prejudge the guilt of the suspect or the accused.

The right to presumption of innocence and to a fair trial is guaranteed by Article 6 of the ECHR, and Article 31 of the Constitution of Kosovo. In principle, judgments are public, so the role of the media is to oversee the functioning of the criminal system and to report litigation. In such cases, there is often a need to balance the right to presumption of innocence with the media's right to freedom of expression in reporting on court proceedings.

Having a fair hearing requires silence in the courtroom, normal work, and respect for the dignity of the court, as well as security for all procedural participants (Sahiti et al., 2014, p. 764). Although the media and civil society have unhindered access to court hearings, their representatives are obliged to comply with the legal provisions regarding order and silence at hearings.

The publicity of hearings should be understood in such a way that it does not in any way undermine the administration of justice. On the contrary, as the European Court of Human Rights (ECtHR) practice states, it serves to protect litigants against the administration of justice in a secret manner, and is one of the ways in which confidence in the courts is maintained.

2. Transparency and accountability

Transparency in the administration of justice contributes to ensuring a fair trial, enabling the media to exercise the role that they have as public controller.

The media and the judiciary have a shared responsibility for administering an open and fair judiciary (Gashi, 2014, p. 236). This system in Kosovo is constantly subjected to criticism for lack of transparency and public accountability, despite the fact that its officials proclaim work on the basis of fundamental principles. In this regard, alongside other areas where the justice system fails to implement the principle of transparency, the Kosovo Institute of Justice, during the process of systematic monitoring of judicial hearings in the criminal field, has identified cases of unlawful and arbitrary closure of certain court hearings, information from which is important for the public, the media, and civil society. Thus the judiciary, unlike other branches of government, tends to be relatively silent in relation to the media. In such circumstances, defence attorneys often take advantage of the case and, in constant contact with the media, promote themselves and divert the truth.

On the other hand, the right to information and access to official documents and transparency in the work of state bodies must not violate the right to privacy of citizens. The sensitive data of the parties (including the accused) cannot be made public.

Public judgments and transparency are fundamental democratic conditions for a civilized country. But if a judgment being open to the public is incompatible with the fairness of the judgment, then the latter shall be given priority. It should also be kept in mind that this may limit public participation and media coverage to the extent necessary to protect other legitimate interests and without the abolition of such rights in full, especially in proceedings against minors but even in cases where they are witnesses in the proceedings.

The ECHR defines cases where the court hearing may be closed. Specifically, Article 6 of the ECHR states that “the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Always in harmony with the ECHR, the Constitution of Kosovo establishes legal guarantees in the courts’ obligation to ensure public trial. Hence: “The judgment is public, unless the court, in particular circumstances, considers that, in the interests of justice, the exclusion of the public, or of media representatives, is necessary because their presence would constitute a threat to public order or national security, juvenile interests, or the protection of the privacy of the parties to the proceedings, determined by law.”

3. Restrictions overseen by law

Regardless of the interest of journalists in providing and publishing as much information as possible, there will always be restrictions on reporting based on basic principles of human rights and professional standards. There are some types of restrictions that apply automatically and others that are at the discretion of the court. The court has a duty to protect the integrity of the legal process from outside influence.

Whilst a verdict is announced to the public, the press and the public may be excluded from all or part of the trial in for reasons that include: morality; public order or national security in a democratic society; the interests of a minor or the protection of the privacy of the parties; or to the extent that in the opinion of the court it is necessary due to special circumstances, where the presence of the public may prejudice the interests of justice.

Cases where the child is a participant in proceedings of any quality, those that include certain types of offenses related to personal and bodily integrity, and cases relating to state security, are also viewed by the law as grounds for closing the hearing. Additionally, the presence of classified information in case files does not necessitate the closing of a hearing to the public without first balancing it against the opening of national security matters.

3.1. National interest and state secrecy

Legitimate reasons for a closed hearing include state, military, business, scientific, or professional secrecy. Because of their mutual importance in social relations, the elaboration of the essence of official secrecy requires its alignment with publicity. Undoubtedly harmony between their subordinates – a balance between defining boundaries of their reach without eliminating secrecy by hyperbolizing publicity – is imposed as a social need (Sahiti & Murati, 2016, p. 97).

Kosovo is not yet a member of the Council of Europe, nor a signatory to the ECHR, but its constitution gives priority to international conventions, and therefore the courts act in accordance with the practice of the ECtHR.

In such situations, and if the reason is not directly related to the interest of the parties in the proceedings, the court may decide to hold a behind-closed-doors trial. In advance, the court takes all measures to verify whether the closure is in the national or governmental interest, and must limit the secrecy that is to some extent necessary to secure such interest, as the ECtHR noted in the *Belashev v. Russia* (4 May 2009) case.

However, the complete secrecy from the public (especially the media and organizations monitoring the justice system) of all judicial decisions may not be justifiable. The ECtHR, in the case of *Raza v. Bulgaria* (16 April 2013), said that legitimate security cannot be accommodated through certain techniques, such as the classification of only those parts of legal decisions, the opening of which would pose a threat to national security or the safety of others.

There are also cases in which trade or military secrecy is involved towards which the courts are not open and information is limited. In cases of investigative secrecy, there is a clear police and prosecution rule that information should not be published in the media.

Also, public order considerations and security concerns may justify the exclusion of the public in disciplinary proceedings in prison against prisoners.

3.2. Child or person with disabilities in the court and closing the hearing

The journalist must protect the rights and dignity of children and people with disabilities, including their right to be heard. Journalists should not exploit the innocence and trust of children. Based also on the journalist's code of ethics (Albanian Media Council, n.d.), they can only publish information or images on a child's privacy if there is a prevailing public interest. When reporting juvenile crimes and juvenile court proceedings, the media should exercise restraint for the sake of consideration of the future of the concerned juvenile. The situation is more complicated when the child is the perpetrator of a crime, and especially when there is serious crime involved. In cases where the child as the perpetrator is deprived of their liberty or is being prosecuted, in addition to respecting their dignity as a human being the needs of their age must also be taken into account. Until the appearance of the case of *V. versus The United Kingdom* (no. 24888/94, 16 December 1999, ECtHR), no consideration had been taken as to how the procedures regarding the guarantees provided by section 6.1 in criminal proceedings against minors (in particular if the procedure was designed primarily to safeguard the rights of adults at trial, such as the right to public proceedings) should be amended in relation to children, in order to improve their understanding and participation. Article 6 of the ECHR itself allows the exclusion of the public from all or some parts of a trial when the interests of juveniles require the circumvention of the general principle that judicial proceedings should be conducted publicly, and recognize that the child's interest in the trial is a relevant and important factor.

3.3. Procedures for offenses of sexual abuse

For those arrested in relation to crimes of a sexual nature, strong publicity has another potential negative consequence. It is a well-known phenomenon throughout the world that those accused of sexual violence are often threatened. Cases of sexual abuse may be the most direct example (Uka, 2019, p. 220). It may be necessary to ensure that alleged victims are not obliged to confront the defendant directly. Therefore the methods and content of questions during the examination by the parties may be limited to guarantee the rights of the victim. If this is the case, it must be balanced to ensure that the defence is afforded a fair trial (The SLYNN Foundation, 2016).

3.4. Protected witnesses

Exceptions to the publicity rule may also be made in the case of the testimony of an anonymous witness or a protected witness. In order to maintain confidentiality, the press and the public are not allowed to be present at

the hearing. Therefore if proceedings are to be wholly or partly held under camera surveillance, this should be strictly required by the circumstances of the case, as the ECtHR said in the case of *Uelke and Bialek v. Poland* (1 March 2011).

In cases where media representatives are allowed to attend court hearings, or are allowed access to official documents, they are notified that disclosing the identity of the witness constitutes a criminal offense and is sanctioned by law. Data on the protected person shall be released only on the basis of a decision from the Program Evaluation Committee. The Commission may prohibit or restrict the issuing of documents and other database managers, and the release of data relating to the protected person. This data may be removed from the Document Release Offices or Database Managers and forwarded to the Directorate, as stated in Article 8 of the Law for Witness Protection. However, the media themselves report that citizens of Kosovo do not feel safe to cooperate with the justice system as witnesses, especially in cases of high-profile corruption (Radio Free Europe, 20 September 2019).

4. Inaccurate reporting

Every individual, irrespective of nationality, race, gender, age or occupation, has a right to privacy which the media must respect and which, without a strong reason that is in the general interest, must not be violated. Adherence to these ethical obligations and the laws and regulations governing these matters requires a clear balance between privacy and the right to provide information to the public. The main concerns related to the media reporting on rule of law issues are the inadequate experience of journalists in criminal law, their lack of understanding of criminal prosecution processes, and their lack of awareness of the consequences that may result from inadvertent or inaccurate reporting. Consequently, the most frequent violations in reporting include the disclosure of individuals' personal data and violations of the presumption of innocence.

Despite these problems, as a result of continuing education on these issues there has been an improvement in the quality of reporting on rule of law issues. Representatives of the Kosovo Judicial Council say that “journalists who have repeatedly reported on the justice system have managed to improve. At first it was impossible to answer their questions because they were too unclear, but now they are more objective and cooperative” (Balkans Policy Research Group, 2019. p. 8).

The publication of a person at trial's previous convictions can also be a serious prejudgment. Journalists say that when the cases they pursue are in the public interest, then their previous history will also need to be included in reporting for the purpose of clarity. There is no specific legislation in place concerning the impact of judgments from the publication of previous cases, and this makes it easier for the journalist to publish such information.

5. Concerns raised by justice system monitors

Systematic monitoring of the justice system by the Kosovo Institute of Justice has shown that, in some courts, a practice of all hearings on request for security measures being closed has been created.

This practice has no legal basis and thus represents an example of arbitrariness in the judicial system. Article 188 of the Criminal Procedure Code of the Republic of Kosovo (CPCRK) determines that “the judge of preliminary procedure conducts the pre-trial hearing.” In this case, nowhere is it mentioned that the public and the media cannot be present at the hearing. As to the closure of the preliminary procedure for the public and media, this is outlined in other specific cases, such as Article 85 of the CPCRK that determines the procedure for the confidentiality of gathering information. In these cases, circumstances and conditions for closing the file are determined. It is understood that there is no legal provision that determines that hearings on the application of security measures are closed, which implies that this practice employed by some courts is completely arbitrary. Moreover, this practice is not followed by all courts, but only by some of them.

Kosovo Institute of Justice considers that these abusive and unlawful practices only reveal the lack of transparency and accountability of some judges of the judicial system towards public, media, and civil society. Such practices are completely arbitrary, and contrary to the statements that actors of the judicial system constantly proclaim. Additionally, any closure of the session, as in the above cases, represents an extremely dangerous precedent for transparency of the judicial system vis-à-vis the public, the media, and civil society. This can create an avalanche of non-transparency, and can become a phenomenon if it continues to fester with new cases, as noted by the Kosovo Law Institute Policy Analysis (2019).

According to the Kosovo Institute of Justice there are a number of cases where judges exclude the public and the media in a completely arbitrary manner by excluding the public, verbally ordering them to leave and not issuing a written ruling at all as required by the provisions of the CPCRK.

Although the media and civil society have reported numerous cases of unlawful and arbitrary closure of court hearings in which the public is interested in being informed, all actors within the justice system remain silent towards these phenomena.

Judges and prosecutors consider the media less as partners and more as external actors that influence their work. Pressure from the media can affect the launch or expedition of a case, whether by the prosecution or the court. It is suspected that local politicians, such as mayors, use newspapers, television, or radio stations to pressure judges to rule in favour of politically connected persons. Such an impact is even more profound if the media company is run or sponsored by operators with dubious agendas (Balkans Policy Research Group, 2019. p. 8).

One representative of civil society noted that “what is present in the media today is often sponsored, meaning that anyone who wants to keep a person or a particular case present in the media can also do something like that” (Balkan Investigative Reporting Network, 2017). They further emphasized that this type of practice is being used as a means of conveying certain messages and exerting pressure on judges and prosecutors.

Recommendations

Transparency and publicity during court proceedings are essential elements that influence the rise of citizens' confidence in justice, and give meaning to the administration thereof. It is therefore more than necessary that the judicial system improves access and transparency for the media and the general public. Building public trust is not an easy task, since transparency often does not comply with some of the principles that the judiciary must follow which relate to fundamental rights. It is therefore very important that each court has a judge, or at least a well-trained professional lawyer, who will be responsible for public relations.

Judicial institutions should invest in creating an environment in which the media and civil society can exercise their role as overseers of mechanisms that govern the rule of law. The Kosovo Judicial Council has drafted guidelines for the use of media and social networks by courts and the Council itself. These guidelines consist of a set of rules, standards, and principles based on which they manage and archive official court websites and social media. Even the Kosovo Prosecutor Council has already started implementing a number of activities foreseen in this strategy. The public relations officers and prosecutors responsible for media in each prosecutor's office have already been appointed.

The justice system consists of a series of links, each of which has a particular role in building the trust of the general public, and therefore accountability should be very high. The judiciary must not hide from the public (with the exception of things that are confidential due to the investigative phase, or sensitive cases as provided for by the law), nor must it be influenced by the media to the extent that it generates opinions that may influence the objectivity of the evidence of a judicial process.

In all of this the media have their role, but they must also take responsibility for what they report. Developments in the justice system should be followed by journalists with a professional background and a greater degree of experience in this field. They must have basic legal knowledge, but also confirm any information before making it public. The desire for, and pursuit of, sensational news does not help justice in the country. Above all, media leaders need to consider their role in society, and contribute to its development by partnering with the justice system.

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